Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

JOSHUA W., ANITA O.,

Petitioners,

v.

USD 259 BOARD OF EDUCATION,
WICHITA PUBLIC SCHOOLS; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

MARGIE BEST
Counsel of Record
LAW OFFICES OF MARGIE BEST, P.C.
39 South LaSalle Street
Suite 915
Chicago, IL 60603
(312) 263-4040

Attorney for Petitioners

119pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER AN ELIGIBLE KANSAS STUDENT MAY BE DENIED RESIDENCY IN A LOCAL KANSAS SCHOOL DISTRICT, AND, THUS BELONG TO NO SCHOOL DISTRICT IN THE STATE?

DOES A PARENT'S UNILATERAL PLACEMENT OF A SPECIAL EDUCATION STUDENT CONSTITUTE OBSTRUCTION AND MANIPULATION WHICH BAR REIMBURSEMENT UNDER *BURLINGTON* AND *CARTER*?

PARTIES TO THE PROCEEDING

Petitioners are Joshua W. and Anita O.

Respondents are the Board of Education of Wichita U.S.D. 259, Board of Education of Andover U.S.D. 385 and Commissioner Andy Tompkins and the Kansas State Board of Education.

There are no parent companies or non-wholly-owned subsidiaries.

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Petitioners Joshua W. and Anita O., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is dated May 2, 2000 [*Joshua W. v. Board of Education*, 2000 U.S. App. Lexis 8837 (10th Cir. 2000)]. The District Court opinions the District of Kansas are dated November 10, 1998 (App. B); August 7, 1998 *Joshua W. et al., v. U.S.D. 259 et al.,* 13 F. Supp. 2(d) 1199 (App. C); June 10, 1997, *Joshua W. et al., v. U.S.D. 259 et al.,* 1997 U.S. Dist. LEXIS 9457 (D. Kan., 1997), (App. E); July 21, 1997 (App. F). The unpublished administrative decisions are dated December 31, 1996 (App. G); and October 13, 1996 (App. H).

STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the Tenth Circuit affirming the decision of the District Court of Kansas was entered on May 2, 2000. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 arising under the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* and 28 U.S.C. § 1343 (a)(3) for violations of civil rights. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Petitioners were granted until September 29, 2000 to file their petition for certiorari (Application No. 00A31). This petition for Certiorari is timely filed on September 29, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., as well as Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and 42 U.S.C. §1983, together with their implementing regulations. Pertinent parts of the statutes and regulations are found at Appendix I.

STATEMENT OF THE CASE

A. DECISIONS BELOW

Petitioners Joshua W. and his mother Anita O. seek a determination of which Kansas school district is responsible for Joshua's education and seeks reimbursement for a residential special education placement during the time when no school district in Kansas would accept him as a resident. There has been no hearing or trial on the merits with respect to an appropriate Individualized Education Program ("IEP") or services for Joshua because petitioners have been denied a finding on the threshold issue of which school district in Kansas is responsible for this Kansas student.

Petitioners filed a request for an administrative due process hearing on December 4, 1995, after Wichita U.S.D. 259 denied Anita O.'s request for residential placement and failed to develop an IEP for Joshua. Petitioners contended that the District had failed to provide appropriate special education services for Joshua, alleged IEP deficiencies and other violations of the child and parent benefits.

On January 16, 1996, the Wichita U.S.D. 259 contended that Joshua W. was not its responsibility and that Andover

U.S.D. 285 was responsible for Joshua because his divorced mother with whom he had not lived since 1986, lived in the Andover U.S.D. 385 school district. Joshua W.'s home was his grandmother's house in Wichita U.S.D. #259. On January 16, 1996, the Wichita U.S.D. 259 Supervisor of Hearings, Department of Special Education, advised Anita O. and the Hearing Officer, "Joshua W. could bring an action in State District Court or in Federal District Court against the Andover school district on the grounds that under Kansas law Andover is the district in which Joshua W. resides and on the grounds that Andover has failed to provide a free appropriate public education to Joshua W. It would not be necessary for Joshua W. to exhaust administrative remedies before bringing a lawsuit against the Andover school district since Andover has refused [] to allow an administrative proceeding to proceed." On February 1, 1996, petitioners also filed a request for a due process hearing against Andover U.S.D. 385 based on Wichita U.S.D.'s conclusion that Joshua was not Wichita's responsibility.

On February 2, 1996 Andover U.S.D. refused to process the hearing request, alleging that due process did not apply to Joshua and Anita O. On February 11, 1996, the Hearing Officer ruled that he had jurisdiction over the residency issue and that he would convene a due process hearing on the residency issue first, before addressing the substantive issues, as the resolution of residency was a pre-requisite to the issues of the educational services appropriate for Joshua. On February 22, 1996, petitioners informed the Hearing Officer that "Andover has refused to process the hearing request because they have determined that Joshua is not a resident of Andover but is the responsibility of W[ichita] P[ublic] S[chools]". Petitioners requested that the hearing officer "join Andover as a necessary party to these proceedings". The Hearing Officer refused Petitioners' motion to join Andover to

the proceeding on March 17, 1996 and again on May 28, 1996, stated that the only issue he would consider is "Joshua's residency as it pertains to whether the Wichita School district, U.S.D. 259, has responsibility for his education."

The hearing was scheduled for October 4, 1996 on the issues of residency and on October 30, 1996 on the substantive IDEA claims regarding the IEP and placement. On October 4, 1996, the hearing on residency was held, and on October 13, 1996, the Hearing Officer ruled that Joshua was not a resident of Wichita and that it was beyond the purpose of this hearing to determine who does have the responsibility for Joshua's education (App. H). The Hearing Officer failed to rule on Joshua's motion assert his rights and to be joined as a necessary party since he had turned 18 years old. The Hearing Officer also denied Petitioner's renewed motion to join Andover to the proceedings.

The Hearing Officer refused to convene a hearing on the issues raised in Petitioner's December 4, 1995 hearing request against Wichita and in their February 1, 1996 hearing request against Andover.

On November 8, 1996 Petitioners timely served their notice of appeal on the Commissioner of Education for the Kansas State Department of Education. In this notice of appeal, petitioners requested that the Commissioner "join Andover School District U.S.D. #385 as a necessary party to these proceedings. Both U.S.D. 259 and U.S.D. 385 deny that Joshua is a resident. Hearing requests were filed against both school districts. Andover U.S.D. 385 has denied Joshua a hearing." The Commissioner and State Department of Education did not respond.

On December 31, 1996, the Administrative Reviewing

Officer would consider only the issue of whether Joshua was a resident of Wichita U.S.D. 259. On November 20, 1995, he affirmed that was not, and again refused to name the school district in which Joshua resided for educational purposes (App. G).

Plaintiffs Joshua W. and Anita O. filed their complaint in federal district court on January 30, 1997 against the Wichita Public Schools U.S.D. 259, Andover U.S.D. 385, the Commissioner of Education and the state education agency, and others. Plaintiffs sought judicial review under IDEA of a decision of the Kansas Reviewing Officer affirming the Hearing Officer's decision, which had determined that Joshua W. was not a resident of Wichita U.S.D. 259 but failed to determine where he resided for purposes of the IDEA and failed to address all claims raised by plaintiffs. The complaint specifically requested that the District Court determine which Kansas school district is responsible for Joshua W. both before and after his 18th birthday, and further sought (a) a declaration that the Plaintiff's rights under the IDEA had been violated by the Defendants, (b) reimbursement for the costs of Joshua W.'s residential special education since November 1995, and (c) an award of costs, expenses and attorney fees under 20 U.S.C. § 1415. In addition, the complaint asserted claims for damages under § 504 of the Rehabilitation Code of 1973 and 42 U.S.C. § 1983.

On March 25, and 31, 1997, Wichita defendants answered the complaint. On April 4, 1997 Andover defendants filed a motion to dismiss and moved for sanctions against Plaintiffs for alleging that Joshua W. could be the responsibility of Andover U.S.D. 385 because his mother Anita O. resided in Andover U.S.D. 385. On June 11, 1997, the District Court granted Andover defendants' motion to dismiss but denied their motion for sanctions because Wichita U.S.D. 259, in fact, had

advised that Andover U.S.D. 385 was the school district responsible for Joshua (App. F). On June 24, 1997, Plaintiffs filed a motion for reconsideration of the order dismissing Andover U.S.D. 385 because Joshua's residency had to rest in either Andover U.S.D. 385 (as Wichita argued) or in Wichita U.S.D.259. Plaintiffs argued that if Andover were dismissed before a trial on the merits, and the court subsequently decided that Joshua was not a resident of Wichita, this disabled Kansan would have no Kansas school district responsible for his special education under IDEA. On July 21, 1997 the District Court denied Plaintiffs' motion and dismissed Andover U.S.D. 385 without a hearing (App. E).

On August 10, 1998, the District Court granted summary judgment in favor of Wichita U.S.D. 259 and Commissioner Tompkins, thus terminating the case without resolving the threshold issue of which school district in Kansas is responsible for providing educational services to Joshua W. during the relevant time period (App. D).

On September 9, 1998, Plaintiffs timely appealed to the Tenth Circuit, which appeal was delayed until March 5, 1999 when the District Court, at the initiation of the Tenth Circuit, enter certification pursuant to Rule 54 (b). On November 10, 1998, the district court dismissed the Kansas State Board of Education (App. B).

On May 2, 2000, the Tenth Circuit affirmed, without identifying Joshua's school district of residence (App. A).

The Tenth Circuit cited the Kansas residency law:

> Under Kansas law, residency with a parent who lives within the jurisdiction of the school district controls which school district is responsible for providing the

free appropriate public education:

> School residence; definitions. (a) Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child; or (2) subject to the provisions of subsection (c) the child lives in the district as a result of placement therein by a district court or by the secretary of social and rehabilitation services; or (3) the child is a homeless child.

Kan. Stat. Ann. § 72-1046(a).

"[P]erson acting as parent" is defined, in relevant part, as follows:

> [A] person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major portion of the cost of support the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been granted custody of the child by a court of competent jurisdiction.

Id. § 7201046(d)(2)(B).

Under the Kansas residency law and the circumstances of his home being at his grandmother's house with his adult sister in Wichita, Joshua could not be a resident of any school district in Kansas even though he was a resident of Kansas. While even homeless students in Wichita were entitled to educational services from Wichita, Joshua was denied residency. The Kansas residency law also allowed Andover to escape any responsibility, because although his mother lived in

the Andover school district, Joshua did not.

The Tenth Circuit also excused Wichita from developing an IEP for Joshua when its IEP expired in November 1995 because Anita O. sought residential placement.

B. EDUCATIONAL HISTORY

Joshua W. has been a resident of Kansas his entire school career. His parents divorced in 1980, and Joshua lived with his father from 1986 on. He was identified as seriously emotionally disturbed/behavior disordered in 1985. From 1991-1995 Joshua's teachers documented his deterioration and failure, his impulsivity, overactivity, distractibility and failure in the Wichita U.S.D. #259 school programs. For part of 8th and the first semester of 9th Grade, Anita O. funded Joshua's placement at a residential school, where he earned mostly B's and C's and was awarded credits in all courses. Thereafter, Wichita U.S.D. #259 placed him at Northwest High School where he failed, his behavior problems went unaddressed, and he failed his academic courses. In 1993, Joshua had failed his second year in Ninth grade in Wichita schools, and it was noted that Joshua was "in need of a highly structured, secured environment". Joshua attended various youth programs during this period because of his behavior problems in school and in the community.

Joshua's 1994-95 IEP recommended residential placement with extensive related services. This IEP was ignored by Wichita, which placed Joshua back at Northwest High School in fall 1994, where he continued to exhibit extremely serious behavior problems symptomatic of his disabilities. Wichita U.S.D. #259 took no steps to implement the residential IEP still in effect, but instead changed him to a part-day school program, noted that their Behavior Disorders

program "has not been appropriate as Josh is failing all classes", and then excluded him with no special education services. The Wichita staff stated that a more restrictive placement may be more appropriate for Joshua but failed to recommend one. The Wichita Psychologist, Patricia Cole, noted that Joshua performs well in very restrictive settings, that the Wichita programs had not met Joshua's needs and that a "more restrictive setting would be appropriate for Josh at this time". After exclusion, the District next recommended he attend his third year in 9th grade (actually he should have been in 11th grade) at Wichita's alternative school, where he failed all courses except "group dynamics". Joshua's problems in all settings, including the community escalated. In 1995, Joshua also had several psychiatric hospitalizations for suicide attempts, danger to self and others, as well as stays in detention, all for behaviors symptomatic of his disabilities. In July 1995, he was placed at Shadow Mountain psychiatric facility, which noted his pattern of failure in the Wichita schools and that he was expelled by Wichita on two occasions. In fall 1995, Anita O. then placed Joshua back in a boarding school. On the way to the school, Joshua threatened Anita O. and she filed charges against him. Anita O. placed Joshua at Kemper Military School.

Very quickly the Kemper principal recognized Joshua's disabilities and contacted Joshua's school district, Wichita U.S.D. 259, and spoke to both psychologist, Patricia Cole and to Sowers principal Bob Coleman and recommended the District place Joshua in a "residential special education program that is equipped and staffed to adequately address his emotional and behavioral needs". Anita O. was informed that school districts can pay for residential special education placements for disabled children and asked Wichita U.S.D. 259 to provide such a placement for Joshua. Joshua's residence was with his father since 1987 because of his severe emotional disabilities/behavior

disorder which manifests in maladaptive behaviors, including physical violence, in reaction to limit setting or any confrontations by authority figures, school officials and peers, including his mother. Anita O. has supported Joshua since 1987, and continued to do so while his residence was at his grandmother's house, with his adult sister, after his father moved out of the house at 144 South Sheridan in Wichita. Joshua's residence remained at 300 Winterset and 144 South Sheridan in Wichita U.S.D. 259 during this time period and not with Anita O. Anita O. contributed to maintain Joshua's residence at 144 South Sheridan. Joshua's father moved out of Joshua's grandmother's family house sometime in October 1995 and Joshua's adult sister then lived in the grandmother's house at 144 South Sheridan which remained Joshua's home. Joshua's residence for the past five years was listed in Wichita.

On Friday, November 17, 1995, Anita O. spoke with Wichita U.S.D. #259 staff and was told to enroll Joshua. She met with Wichita social worker and requested U.S.D. 259 provide Joshua residential placement at School District expense. The, Director of Kemper Military School, had already told U.S.D. 259 of Joshua's need for a residential special education placement. In September 1994, Joshua's last implemented IEP was the 1994-95 IEP for "public residential facility" based on "comprehensive evaluation, prior placement, teacher observations" and included extensive psychological counseling, social work services and other related services, which Wichita U.S.D. 259 failed to provide. In November 1995, District staff informed Anita O. that Joshua had already failed at all the District's placements. When the Wichita U.S.D. #259 social worker found out that Anita O. had placed Joshua at Three Springs, she testified that she "was glad [Joshua] was in a residential placement." On November 17 and 20, 1995, Anita O. gave the District significant information about Joshua W., and the District also had in its files extensive documentation of

Joshua's failure in all the District special education programs including Sowers. As early as October 1994, Wichita U.S.D. 259 had stated that it had no viable educational resource for Joshua in Wichita. U.S.D. 259 took none of the required steps to initiate an evaluation of Joshua, but only asked Anita O. to sign releases for the District to obtain records, which Anita O. signed.

Between November 17, 1995, when the U.S.D. 259 accepted Joshua as a resident, and January 12, 1996, when U.S.D. 259 dropped Joshua as a resident, the District convened no meetings to review any of Joshua's records, never made any decision on Anita O.'s request for residential placement, except to tell her how happy they were that she had secured residential placement for Joshua, did not even start the necessary paperwork to begin an evaluation of Joshua, and never requested that Anita O. return Joshua to the District for an evaluation. Instead, the District told Anita O. that Joshua could not make it at Wichita U.S.D. #259 and said prison would be best for Joshua, a stance adopted by U.S.D. 259 for years. The District failed to develop any IEP for Joshua on November 20, 1995.

Anita O. obtained private psychological evaluation of Joshua on November 30, 1995 and December 14, 1995 and provided it to U.S.D. 259, but U.S.D. 259 ignored the information.

Anita O. specifically informed the District of her change of address and fully informed the District that Joshua's home remained at 144 South Sheridan, with his adult sister, in his grandmother's house. The District failed to inform Anita O. of any concerns or problems with this living arrangement and District Director of Special Education Mark Hartke provided Anita O. information stating that in legal language, "lawful custodian" is defined as:

(1) Parent

(2) Guardian
(3) Adoptive parent
(4) Other person having legal custody of a child
(5) Step-parent
(6) Other person related to the child
(7) Person liable by law to maintain care for or support the child, or
(8) If non of the above is known or can be found, an agency shall cause proper proceedings to be instituted pursuant to the Kansas code for care of children to determine whether the child is in need of care.

Wichita U.S.D. #259 did not inform her of the necessity for "written consent". Joshua's adult sister met this criteria (6). The District failed to inform Anita O. of any concerns over Joshua's residency in U.S.D. 259 or that U.S.D. accepts out-of-district students and that parents can decide the students' residency. The District testified that the District never funds any out-of-state residential placements and never accepts non-resident special education students, only regular ed students. The District was made fully aware of Anita O.'s residence and Joshua's home with his sister in his grandmother's house at 144 South Sheridan on November 17, 1995 but took no action regarding Joshua's residency in U.S.D. 259 except to count him present in the District from November 20, 1995 through January 12, 1996.

On January 16, 1996 while the administrative proceedings were pending and "stay put" applied, Mark Hartke, U.S.D. 259 Director of Special Education, wrote to the Hearing Officer to inform the Hearing Officer of U.S.D. 259's unilateral decision that Joshua was Andover No. 385's responsibility and

that "the responsibility for all due process proceedings now shifts to the Andover School District".

Based on Wichita U.S.D. #259's statements, Anita O. filed a Hearing request against Andover to join Andover to the proceedings but Andover refused to process the request. Wichita U.S.D. #259 further stated on March 5, 1996 that U.S.D. 259 did not object to joining Andover No. 385 as a necessary party, and that Joshua did not need to exhaust administrative remedies but should sue Andover in Court because "Andover is the district in which Joshua W. [ ] resides and on the grounds that Andover has failed to provide a free appropriate public education to Joshua W. [ ]." Anita O. provided extensive information and records to Wichita on November 17, 1995, and November 20, 1995, including information about Joshua's legal problems, assault and threats, placement at Crawford County jail, Larned, Topeka State Hospital, Charter Hospital, Shadow Mountain Hospital, the State, the SRS, St. John's, Kemper, signed consent for Wichita to obtain records from Charter and Shadow Mountain and encouraged the District to talk to the professional staff at these Charter and Shadow Mountain regarding Joshua's need for residential placement. At the November 20, 1995 conference, the District did not provide Anita O. any written recommendations, did not prepare the required Notice of Intent to Evaluate, nor did the District provide Anita O. written notice of her IDEA rights. Anita O. specifically told Wichita U.S.D. 259 her address and that Joshua did not live with her. The District did not object, sent Anita O. notice that KSA 72-962 defined a "parent" as "other person related to the child", which fit Joshua's sister. Anita O. left no doubt on November 17 and 20, 1995 that she was requesting that Wichita U.S.D. 259 pay for residential placement for Joshua. Joshua turned 18 years old during the administrative proceedings, moved to be joined as a necessary party to the Hearing and filed an affidavit

establishing his residency in Wichita, all of which were ignored by the administrative officers and the courts.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE HOLDINGS OF THIS COURT AND WITH FEDERAL LAW AND WITH THE HOLDINGS OF OTHER COURTS OF APPEALS, AND, IF LEFT UNDISTURBED WOULD DENY A CLASS OF ELIGIBLE DISABLED STUDENTS THEIR RIGHTS TO EDUCATIONAL SERVICES UNDER THE IDEA

Unquestionably, Joshua resided in Wichita U.S.D. # 259 even though he may not have been physically present in the district at all times, or in November 1995. School residency statutes "in no way excuse a school district's responsibility to disabled children residing within the district who receive their free appropriate education in a placement outside the district." *Union School District v. Smith*, 15 F.3d 1519 (9th Cir. 1994). In addition, "no basis [exists] for holding that the determination of residency under IDEA or the [Kansas education statutes] should be different from the ordinary determination of residency." *Id.* (under "the ordinary measure of residency," child who, during the school week, resided at a location in Los Angeles outside plaintiff school district while attending a private counseling clinic, in which his parents placed him after district failed to offer a free appropriate education to child, remained a resident of the district while child attended the clinic). In other words, "residency for special education coverage purposes is measured by the normal standards." *Id.*

For school purposes, the term "residence" signifies the place where a child lives "with *some degree of* permanency." *School District No. 16-R Umatilla County v. McCormmach*, 238 Or. 51, 392 P.2d 1019 (1964) (emphasis added). Thus, just as temporarily maintaining a second residence in Los Angeles for the sole purpose of being able to commute daily to an appropriate residential educational program does not affect the child's permanent residence within a San Jose school district, *Union School District v. Smith*, 15 F.3d at 1525, temporarily attending a residential educational placement in another state, namely Tennessee, did not affect Joshua's permanent residence within Wichita U.S.D. 259.

The underlying opinions erroneously made perpetual or constant physical presence within Wichita U.S.D. 259 a condition of residency for special education coverage purposes. If this position were to be upheld, school districts who wanted to save money by placing severely disabled children in expensive residential placements could force parents, through inappropriate placements or inaction, to place them in out-of-state residential facilities and thereby shift the costs of the placements to other states and school districts where the facilities and the disabled child were physically present.

Moreover, the district court further erred in determining that Joshua was not living with, i.e., residing with, "a person acting as a parent." The Kansas school residency statute provides that "a person acting as a parent" means either a guardian or conservator or

> (B) a person, other than a parent, who [1] is liable by law to maintain, care for, or support the child,or [2] who has actual care and control of the child and is contributing the major portion of the cost of support of the child, or [3] *who has actual care and control of the child*

> *with the written consent of a person who has legal custody of the child*, or [4] who has been granted custody of the child by a court of competent jurisdiction[.]

K.S.A. § 72-1046(d)(B) (emphasis added). The district court reasoned that since Joshua's mother "continued throughout this period to act to support Joshua and to make decisions regarding his control and education," Joshua's older sister could not qualify as "a person acting as a parent" (App. D, Mem.& Order at 11).

In fact, the record is clear that "a person who has legal custody of" Joshua, namely his mother Anita O., has delegated the day-to-day "actual care and control" of Joshua to his older sister. The term "actual" means "real" or "substantial" as opposed to "theoretical, hypothetical, or nominal." Black's Law Dictionary 53 (4th ed. 1968). It makes no difference that Anita O. continued to "support" Joshua, nor that Anita O. retained the ultimate right "to make decisions regarding his control and education." The statute imposes no requirement that the delegee provide support to the child, nor that the legal custodian of the child relinquish *all* future control over the child. It requires only that a person with legal custody delegate "*actual* care and control", i.e., real and substantial as opposed to nominal control, to a person residing within the district.

Nor does it make any difference that the consent of Joshua's mother to his older sister's day-to-day control over Joshua was not put in writing. Under the doctrine of substantial compliance, it is sufficient that Joshua's mother has substantially complied with the requirements of K.S.A. § 72-1046(d)(B), by delegating real and substantial care and control of Joshua to his older sister. *Cf. In re Adoption of J.H.G.*, 254 Kan. 780, 869 P.2d 640 (1994) (applying the doctrine of

substantial compliance to statutory requirements for adoption). The absence of a written consent does not undermine the statute's purpose to limit "persons acting as parents" to those actually acting in loco parentis.

In sum, the district court erred in determining that Joshua must be physically present within the Wichita district in order to be entitled to receive special educational services from such district, and further erred in determining that Josha's older sister was not "a person acting as a parent" under K.S.A. § 72-1046(d)(B). Thus, the district court erred as a matter of law in granting summary judgment in favor of the Wichita defendants on the grounds that Joshua was not a resident of and therefore not entitled to special educational services from Wichita U.S.D. 259. Wichita U.S.D. 259 had not challenged Joshua's residency at any time until it was asked to pay for residential special education placement.

Moreover, the dismissal of Andover U.S.D. #385, the school district in which Anita O. resided, from the proceedings, following Andover's refusal to grant Anita O. a due process Hearing to determine her rights based on her unchallenged residency in Andover U.S.D. #385 left her son without a responsible Kansas school district. The United States Department of Education, Office of Special Education Programs ("OSEP") has held that the residency of a disabled student is generally that of his parent. Thus, Anita O. had every right to bring a Hearing against Andover to determine if the OSEP guidelines apply in this case. Her Hearing request has now been pending 4½ years.

The Hearing Officer, the Reviewing Officer, the District Court and the Tenth Circuit all erred because none would state unequivocally which school district in Kansas was responsible for the education of Joshua W. Throughout the underlying

proceedings, petitioners moved to join Andover U.S.D. #385 as a necessary party to the proceedings, but this request was repeatedly denied by the Hearing Officer, the Commissioner of Education, the Reviewing Officer and the District Court.

This Court has considered residency laws and found that:

> Permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.

Vlandis v. Kline et al, 412 U.S. 441 (1973).

Moreover, in *Carrington v. Rash*, 380 U.S. 89 (1965), this Court held that a permanent irrebutable presumption of nonresidence violates the Equal Protection Clause of the Fourteenth Amendment. While Kansas might have an interest in establishing residency requirements for students, the State must ensure that *all* resident students in the State are provided educational services. The Kansas statute does not pass muster because it excludes students like Joshua from residency in *any* school district in the State, and thus denies him his rights under the Constitution and IDEA. In Joshua's case, the State had no established criteria for determining which school district was responsible for Joshua, only one for excluding him from residency in all school districts in Kansas[1].

Under the Kansas residency law, Joshua W. could never be a resident of Wichita U.S.D. #259 because he did not live there with a parent after his father left in October 1995. His home continued to be in his grandmother's house with his adult

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1 Indeed, Joshua could have qualified for residency in Wichita had he been homeless. Since his home was in Wichita in his grandmother's house, with his father until he moved out in October 1995, while his adult sister remained, he was forever prevented from residency in all school districts in Kansas as long as he maintained the same home.

sister without *written* consent of a parent as required by the Kansas residency law.

Likewise, Joshua W. could not be a resident of Andover U.S.D. #385 because, while his mother lived in the District, he did not, and in fact, had not lived with her since 1986.

Further, Joshua, as an 18 year-old, was denied residency in Wichita when he filed his affidavit of residency with the Hearing Officer and moved to be joined to the proceedings, but was ignored.

Thus, any eligible student in Kansas who lives with anyone without written permission from his parent, even when that person is a relative, is barred from receiving educational services in Kansas. The Kansas statute does not foster the State interest in providing educational services to all eligible students in the State but instead carves out an exception and operates to deny all services to a disabled student such as Joshua. Such an impact violates IDEA, which requires the State to provide special education and related services to all eligible students in the State, including to Joshua.

When the principal at Kemper Military School informed Anita O. that he had contacted the psychologist and principal in Wichita U.S.D. #259 in early fall 1995 to advise that Joshua required a residential *special education* program, she first became aware that *school districts* can place and fund eligible students in residential special education placements. She then promptly requested residential placement from Wichita U.S.D. #259. However, she had seen since 1985, when Joshua was first identified as seriously emotionally disturbed under the IDEA, that Wichita U.S.D. #259 would not provide any more that the exclusion or minimal programs in which Joshua failed for years. As of fall 1995, Joshua had spent 3 years in 9th grade

in Wichita U.S.D. #259, failing throughout the process.

Kansas residency law provides school districts a technical loophole for excluding Joshua and other similarly situated Kansas students from residency in a local school district. The IDEA, 20 U.S.C. §1400 *et seq.*, assures all disabled children a free appropriate public education ("FAPE"). States receiving funding under IDEA, Kansas in the instant case, must have in effect a policy and system for assuring all children with disabilities FAPE and must establish specific procedures for assuring compliance by both state and local school districts. 20 U.S.C. §1412. IDEA delegates supervisory authority to the State Education Agency, which is responsible for policies and procedures to ensure compliance with IDEA, including compliance with the requirement that all disabled students have an IEP in place and that all parents of disabled students (and disabled students at the age of majority) are afforded procedural safeguards, including due process Hearings. 20 U.S.C. §§1412, 1415.

There has yet to be a due process hearing or trial on the merits of Petitioners' IDEA claims, which were raised in the December 4, 1995 and February, 1996 Hearing requests filed against Wichita U.S.D. #259 and Andover U.S.D. #385, respectively, and then raised in Plaintiffs' complaint.

To date, there has been only one Hearing, on October 4, 1996, in which the Hearing Officer refused to determine Joshua's school district of residence.

For years, Wichita U.S.D. #259 used exclusion law enforcement in lieu of an appropriate IEP and services for Joshua, even when it had in its possession an IEP for 1994-95 *requiring* residential placement. Anita O. had unilaterally placed and paid for Joshua to attend private residential school

before 1995, when Wichita U.S.D. #259 refused to provide him appropriate services and used exclusion and incarceration as a substitute for the special education. Joshua is a student whose disabilities are so severe and complex as to require residential placement. States must include residential placements in the continuum of services as a condition of the State's receipt of federal IDEA funds[2]. The Kansas residency law as applied by the Hearing Officer, Reviewing Officer, the District Court and the Tenth Circuit violates petitioners' rights because it creates a permanent irrebuttable presumption of non-residence, and violates the Due Process Clause of the Fourteenth Amendment (See: *Vlandis v. Klein*, 412 U.S. at 455).

II.

PARENT'S UNILATERAL PLACEMENT OF A SPECIAL EDUCATION STUDENT DOES NOT CONSTITUTE OBSTRUCTION AND MANIPULATION AND BAR REIMBURSEMENT UNDER *BURLINGTON* AND *CARTER*.

Even though the underlying administrative and court decisions failed to determine where Joshua resided for school purposes, and although petitioners have been denied a Hearing and trial on their IDEA claims, the underlying opinions mischaracterize as "manipulative" parents who ask a school district for residential special education placement, and then make a unilateral placement when refused. Thus, the focus is on attacking petitioner for providing what the school districts knew for years was necessary to provide Joshua FAPE. All administrative Hearing Officers and the Courts have yet to

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2 IDEA even requires school districts to serve eligible students who are incarcerated, thus, any incarceration would not strip Joshua of his eligibility. Of course, Wichita U.S.D. #259 continuously used exclusion and failed to develop an appropriate IEP and services for Joshua.

determine Joshua's residency at the relevant time period. Petitioners' were told that this threshold question needed to be determined *before* their IDEA claims could be addressed. Now, five years later, Petitioners are still waiting for the residency determination.

In *Burlington* [*School Comm. of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985)] and *Carter* [*Florence County School District Four v. Carter*, 950 F.2d 156 (4th Cir. 1991), *affirmed*, 510 U.S. 7 (1993)], this Court supported retroactive reimbursement in certain cases. Like petitioners here, the parents in those cases might be termed manipulative because they "manipulated" their children into appropriate special education programs when the school districts failed in their responsibilities. Here, Anita O. had long viewed Wichita's refusal to provide her son the intensive special education services he required and instead excluded him and contributed to his legal problems. She had placed and paid for residential school in 1993, when Wichita U.S.D. #259 failed to act. She had repeatedly paid for evaluations that Wichita U.S.D. #259 failed to conduct. When the Kemper principal told her he had contacted Wichita U.S.D. #259 early in the 1995-96 school year to advise them that Joshua required a residential special education placement, she first learned that a school district could pay for the services she had long paid for and she requested residential special education. That she acted unilaterally after Wichita U.S.D. #259 developed no IEP, no interim IEP, made no written recommendations and failed to generate any referral for a case study in November 1995, is to her credit, and was reasonable considering the pattern and practice of this school district. From the beginning of this case in 1995, she fully advised Wichita U.S.D. #259 of her address, of Joshua's psychiatric hospitalizations, of his legal issues and that he lived with his adult sister in Wichita. Only when she requested residential

placement at school district expense and asked for a Hearing did Joshua become a pariah, a resident of *no* school district in the state.

As of November 1995, Joshua had spent three years in 9th grade in Wichita U.S.D. #259 schools, all of which he failed. Once residency is established, Petitioners would easily have established that Joshua W. required residential placement. Petitioners were denied their right to pursue their IDEA claims through the Hearing process.

Under *Board of Education of the Hendrick Hudson Central School District, Westchester County, et Al. V. Rowley, by Her Parents, Rowley et al.*, 458 U.S. 176 (1982), FAPE is provided when a school district complies with all requirements of IDEA. The Court of Appeals acknowledges that there was no IEP developed for Joshua, that his Wichita IEP expired November 1995. It is also undisputed that Andover U.S.D. #385 refused Petitioners a Hearing, even when Wichita U.S.D. #259 advised that Andover U.S.D. #385 was responsible for Joshua. Further, it is undisputed that no Hearing was ever held on any of Petitioners' substantive claims because the threshold issue of residency is still unanswered.

IV.

THE QUESTIONS PRESENTED ARE IMPORTANT

The questions presented here have a significant impact on the education of children with disabilities who are denied residency because they may require residential placement.

First the opinions below ignored the question of which school district in Kansas is responsible for this Kansas student and never heard evidence on the substantive claims. It is

pointless to address residency piecemeal, in a vacuum, first applying the residency law to one district and then another, when the ultimate question of which school district in Kansas is Joshua's school district of residence is not ever addressed. The administrative Hearing Officers, the District Court and the Court of Appeals were all content to find that Joshua W., a life-long resident of Kansas, had no responsible school district of residence during the relevant time period. Such decisions have a profound effect on disabled students.

Second, the Tenth Circuit's finding that a parent is "manipulative" and barred from reimbursement for unilateral placement under *Burlington*, especially when that placement is made while the school districts are denying responsibility for her disabled son, is contrary to this Court's holding in *Burlington*. No hearing or trial had been held on any of petitioners substantive claims. The holdings are particularly harsh since petitioners were denied Hearings under IDEA, and because Wichita U.S.D. #259 had a long history of excluding this student and denying him services.

Finally, the Tenth Circuit holdings encourage incarceration as the "service provider of choice" for students with severe emotional disturbance who are difficult to manage yet are entitled to intensive special education and related services throughout their school career. Joshua had an IEP for residential placement in 1993, which Wichita U.S.D. #259 chose to ignore. Deflection of such students to the streets is not a viable or legal alternative to compliance with the requirements of IDEA. Such may allow school districts short-term financial benefit but fails to address the long-term cost to society and to the students themselves who are then ill-prepared to achieve the self-sufficiency contemplated by Congress when it enacted the IDEA.

CONCLUSION

For the reasons set out above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARGIE BEST
Counsel of Record
LAW OFFICES OF MARGIE BEST, P.C.
Attorney for Petitioners
1131 Lake Street, Suite 316
Oak Park, Illinois 60301
(312)263-40440